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CASE NO. 83-232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGIA STATE BOARD OF NATUROPATHIC EXAMINERS AND REGISTRARS, INC., et al.,

Petitioners,

v.

MICHAEL BOWERS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Issue Presented

Whether the Eleventh Circuit Court of Appeals correctly affirmed the district court's dismissal of petitioners' complaint for failure to meet the jurisdictional prerequisite of presenting a substantial federal question.

II. Statement of the Case

This action was brought by two unlicensed "naturopaths", (Berryhill and Thomas), two naturopathic "patients" (Bailey and Canales) and the Georgia State Board of Naturopathic Examiners and Registrars, Inc., which, contrary to its name, has no connection with the State of Georgia and is a private organization purporting to "self-regulate" the practice of naturopathy.

Below, petitioners sought declaratory and injunctive relief from the district court authorizing them to practice "naturopathy", a healing art, without the benefit of any license from a health-related regulatory agency of the state. The district judge, after hearing the merits on

briefs, ruled that petitioners' contentions had been authoritatively rejected by decisions of this Court, and dismissed the complaint for want of a substantial federal question. The Eleventh Circuit Court of Appeals summarily affirmed the district court's decision.

III. Statement of the Facts

In 1950, the Georgia Board of Naturopathic Examiners, a state agency having no connection with the petitioner, was created by the Georgia legislature for the purpose of establishing standards and procedures for licensing and regulating the practice of naturopathy in Georgia. Ga. Laws 1950, p. 168.

In 1956, the Act creating the Board of Naturopathic Examiners was repealed. Ga. Laws 1956, p. 36. Although the 1956 Act contains a definition of "naturopathy", authorizes its practice by licensed practitioners of the healing arts, if the applicable licensing statute so allows, and includes a penalty provision, Ga. Laws 1956, p. 36 (O.C.G.A. § 43-34-1; former Ga. Code Ann. §§ 84-2901, 84-2902, 84-9949), the Act of 1956 effectively eliminates any mechanism for issuing licenses to "naturopaths", or for evaluating the competency or qualifications of persons desiring to practice naturopathy, other than those contained in existing statutes

regulating the healing arts. Ops. Att'y Gen. 1960-1961, p. 415; 1954-1956, p. 546.

In 1982, when the Official Code of Georgia Annotated (O.C.G.A.) replaced the unofficial Georgia Code Annotated as the official compilation of Georgia laws, O.C.G.A. § 1-1-1, the statute defining naturopathy was placed in the chapter regulating physicians and surgeons. O.C.G.A. § 43-34-1.

While the status of naturopathic practitioners licensed under the 1950 Act has been the subject of judicial interpretation as well as an opinion of the Attorney General, see Mills v. Adams, No. A54160 (Superior Court of Fulton County, April 20, 1956) (previously-licensed naturopath unaffected by repeal); Op. Att'y Gen.

U65-96 (previously-granted naturopath licenses did not expire), the status of persons desiring to practice the healing art of naturopathy, but possessing no license from any state regulatory board of the healing art, was the subject of an inquiry to the State Attorney General.

The Attorney General issued an official opinion, stating that the practice of naturopathy by persons other than those who had been licensed by the former Georgia Board of Naturopathic Examiners, or who were otherwise licensed as practitioners of the healing arts, constituted the "practice of medicine" within the meaning of the Georgia Medical Practice Act. Op. Att'y Gen. 82-11.

Petitioners, contesting said opinion, filed the action at bar.

IV. Summary of Argument

1) At least seven cases challenging state regulation of naturopathy have been reviewed by this Court, and such contentions have been firmly, repeatedly and authoritatively rejected.

2) No conflict exists among the decisions of the circuit courts concerning the issues at bar; the cases cited by petitioners as creating such a conflict actually support the conclusion that petitioners' claims are not viable.

3) The Georgia Medical Practice Act proscribes the practice of medicine without a license; it does not make the practice of naturopathy

illegal. Said Act is not unconstitutionally vague as applied to petitioner "naturopaths", who possess no license to practice any healing art in Georgia and purport to diagnose and treat diseases for compensation;

4) The district court dismissed the petitioners' complaint because of its failure to present a substantial federal question; the district court did not improperly abstain from considering petitioners' claims because of a potential criminal prosecution; it simply found such claims to be unsubstantial.

V. Argument

A. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S DISMISSAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

After receiving briefs, affidavits and various exhibits on the merits of

this matter, the district court, citing Idaho Association of Naturopathic Physicians, Inc. v. United States Food and Drug Administration, et al., 582 F.2d 849 (4th Cir. 1978), cert. den. 440 U.S. 976 (1979), dismissed petitioners' complaint for want of a substantial federal question. The district court was particularly persuaded by the fact that this Court has reviewed at least seven cases challenging state regulation of naturopathy, and has "firmly, repeatedly, and authoritatively rejected such contentions." Id. at pp. 853-854.

B. THERE IS NO CONFLICT IN THE CIRCUIT COURTS REGARDING THE CONSTITUTIONAL VIABILITY OF STATE STATUTES REGULATING THE PRACTICE OF NATUROPATHY.

Petitioners' assertions to the contrary, there is no conflict in the decisions of the Fourth and Fifth Circuits concerning petitioners' claims. In so arguing, petitioners lose sight of the fundamental basis for both the Fourth Circuit's decision and the district court's dismissal of this action -- the fact that this Court, in reviewing similar challenges, has uniformly rejected them. In fact, when the cases cited by petitioners in support of their position were ultimately reviewed by this Court, lower-court findings upholding the constitutionality of the respective regulatory schemes were

upheld. See England, et al. v. Louisiana State Board of Medical Examiners, et al., 246 F. Supp. 993 (E.D. La. 1965), aff'd 384 U.S. 885 (1966), reh. den. 385 U.S. 890 (1966) (chiropractic) ; Stuart, et al. v. Wilson, et al., 211 F. Supp. 700 (N.D. Tex. 1962), aff'd 371 U.S. 576 (1963) (naturopathy).

Thus, the unsubstantial nature of Petitioners' claims stems from the fact that previous decisions of this Court have foreclosed the subject and leave no room for the inference that the questions raised can be the subject of controversy. See Hagans, et al. v. Lavine, 415 U.S. 528 (1974); Heaney, et al. v. Allen, et al., 299 F. Supp. 1300 (E.D. N.Y. 1969).

C. THE GEORGIA MEDICAL PRACTICE ACT, WHICH PROSCRIBES THE PRACTICE OF MEDICINE WITHOUT A LICENSE, IS NOT UNCONSTITUTIONALLY VAGUE.

The sole issue determined by the district court, and the sole issue before this Court, is whether petitioners' claims are so unsubstantial as to warrant dismissal for want of a substantial federal question.

In contending that the Georgia Medical Practice Act is unconstitutionally vague, as applied to unlicensed "naturopaths", petitioners erroneously presume that the Medical Practice Act makes the practice of naturopathy illegal. Such is simply not the case. The issue in this case has never been <u>whether</u> naturopathy can be practiced, but <u>who</u>

can practice it. Following petitioners' rationale inevitably leads to the conclusion that anyone can practice that healing art for a fee and without an appropriate license. No statute cited by petitioners, nor any rational interpretation thereof, can be said to authorize the diagnosis and treatment of diseases of human beings for a fee, regardless of the methods employed, without an appropriate license from one of the applicable regulatory health boards of the state. It is abundantly clear that when a person does engage in such diagnosis or treatment, and does not hold an appropriate license from the

state,[1] he is not illegally practicing naturopathy -- he is illegally practicing medicine. See Georgia Association of Osteopathic Physicians and Surgeons v. Allen, 31 F. Supp. 206 (M.D. Ga. 1940).

D. THE DISTRICT COURT DID NOT IMPROPERLY ABSTAIN FROM CONSIDERING PETITIONERS' CLAIMS; IT CONSIDERED THEM AND FOUND THEM UNSUBSTANTIAL.

Petitioners' reliance upon Steffel v. Thompson, et al., 415 U.S. 452 (1974) is misplaced. The district court did not abstain from determining petitioners' claims; the court

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[1]Licenses to practice naturopathy issued under the 1950 Act are still recognized by the state. Op. Att'y Gen. 82-11; Op. Att'y Gen. U65-96.

considered them and held that the claims did not present a substantial federal question. See Hackin v. Arizona, et al., 389 U.S. 143 (1967), reh. den. 389 U.S. 1060 (1967). Marder v. Massachusetts, 377 U.S. 407 (1964).

VI. SUMMARY

There is no constitutional right given to particular persons who entertain peculiar theories of medicine, who group themselves together and call themselves a special school of medicine under a selected name, to be recognized and dealt with as such. Dantzler, et al. v. Callison, 94 S.E.2d 177 (S.C. 1956) appeal dismissed for lack of a substantial federal question, 352 U.S. 939 (1956).

The Georgia legislature did not cut down the field of practice known and defined as "naturopathy"; in effect, it raised the standards of those who would in the future operate in such field. Id. In so doing, the legislature was not dealing with the profession, but with those who practice it. Id. Neither the statutes themselves nor the Attorney General's interpretation prevent petitioners from applying the tenets of naturopathy, or from receiving naturopathic treatment, provided that the naturopathic practitioner meets the qualifications established by the state as necessary for anyone who undertakes to heal the public for a fee. Hitchcock, et al. v. Collenberg, et al., 140 F. Supp. 894 (D. Md.

1956), aff'd 353 U.S. 919 (1957).

The district court's decision, as affirmed by the Court of Appeals, is not only correct, but is mandated by previous rulings of this Court. Accordingly, petitioners' application for writ of certiorari should be denied.

Respectfully submitted,

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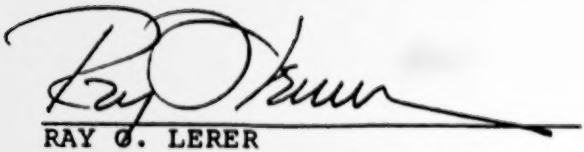

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief in Opposition to Petition for Writ of Certiorari, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 9th day of September, 1983.

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